

Supreme Court, U. S.
FILED

SEP 3 1976

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-155.

ALLIED WITAN COMPANY,
Petitioner,
vs.
THE ARO CORPORATION,
Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit**

GEORGE B. NEWITT,
DANIEL M. RIESS,
ALLEGRETTI, NEWITT, WITCOFF &
MCANDREWS,
125 South Wacker Drive,
Chicago, Illinois 60606,
(312) 372-2160,
Attorneys for Respondent.

TABLE OF CONTENTS.

	PAGE
Statutes Involved	1
Statement of Case	2
A. Errors in Allied's Statement of Case.....	2
B. Aro's Statement of Case	3
Reasons Why Certiorari Must Be Denied.....	6
A. Allied Made No Showing at All That Circuit Courts Are at Variance on Jurisdiction Question	6
B. Judgment Does Not Prohibit Allied from Chal- lenging the Patent and Is in No Way Contrary to Lear	7
C. Allied Waived an Evidentiary Hearing.....	7
D. Additional Reasons for Denying Petition.....	8
Conclusion	9

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.

STATEMENT OF CASE.

A. Errors in Allied's Statement of Case.

Following are listed some inaccuracies in Allied's Statement of the Case:

1. Allied's statement (Petition 5) that its products are occasionally termed "filter-muffs" is not an established fact. Only Allied refers to its mufflers as "filter-muffs." This expression was first used in advertising material published only *after* settlement negotiations had commenced (Motion to Vacate Ex. 4, 5, 9, 10).

2. Allied's statement (Petition 8) that a collateral oral agreement between counsel existed respecting prompt notification of Aro's licensees, and that Aro breached this oral collateral agreement (Petition 9) are not factual. No such oral collateral agreements ever existed (A. 7, A. 19).*

3. Allied's inference (Petition 8) that Aro's agreements with its other licensees contained an express acknowledgement of validity and infringement is false. Aro's agreements with its other licensees contain no such provision.

4. Aro has never conceded that use of the products as filters would be non-infringing as stated (Petition 8n. 5) by Allied.

5. Contrary to Allied's statement (Petition 9n. 6) that the court did not comprehend the importance to Allied of the alleged oral collateral agreement, the District Court fully comprehended Allied's excuses for non-performance, which it denominated as "specious" (A. 19). The Court of Appeals held that even if the

* A refers to pages in Allied's Appendix to its Petition.

alleged oral agreement existed, they "would not constitute an excuse for Allied's dishonoring of its agreement" and "could have no effect on Allied's duty to comply with its agreement" (A. 7).

B. Aro's Statement of Case.

From the following recitation of facts it is apparent that Allied's present petition is merely another attempt to frustrate Aro's quest for justice. This attempt would include, as "a pawn", the Supreme Court (A. 9).

The history of this litigation is one of "delay and confusion" (A. 29) by design of Allied.

At the very onset of the litigation, Allied counterclaimed with several spurious counts of unfair competition. Incredibly, one included a charge that Aro harassed Allied simply because the *marshal* tried to serve the summons and complaint at the home of the president of Allied. The district court recognized the specious nature of these counterclaims and granted early summary judgment for Aro (District Court Memorandum, June 28, 1972). After denial¹ of a request for reconsideration of the court's dismissal of the unfair competition counterclaims, Allied filed the first² of three appeals in this litigation. That appeal was ultimately withdrawn and dismissed on June 14, 1973.

During the ensuing proceedings, the district court, on a Rule 37 motion, ordered Allied to submit to discovery and awarded Aro its attorney's fees in obtaining the order (District Court Order, June 29, 1972). Only after that order issued did Allied lend an ear to Aro's previously proposed settlement offer (Motion to Vacate, Ex. 2, dated October 13, 1972).

From that time until the settlement agreement now at issue was concluded, the history of negotiations was one of reminders by Aro and delay by Allied. No less than seven settlement agree-

1. District Court Order, September 29, 1972.

2. United States Court of Appeals for the Sixth Circuit, Appeal No. 72-2144.

ment drafts passed back and forth between the parties during approximately one and a half years of negotiation (A. 2). During all this time, Allied delayed compliance with the court's discovery order and refused to pay the award of attorney's fees.

Finally, and only with the assistance of the district court³, a compromise and settlement was concluded. Allied took a license under the patent in suit, and the suit was dismissed without prejudice. As part of the settlement, Aro waived the attorney's fees awarded by the court and released Allied, its suppliers and customers for past infringement (A. 7).

Almost one month to the day from the date of dismissal, and before any performance whatsoever under the settlement agreement, Allied advised Aro of its intention not to perform under the settlement agreement (A. 2). It was this breach by Allied which led Aro to file its motion to vacate the consent dismissal in the district court, and to order specific performance of the settlement agreement upon which that dismissal was founded.

After considering memoranda⁴ by the parties, the court granted Aro's motion to vacate the dismissal and ordered specific performance of the settlement agreement (A. 16-A. 21).

Continuing its scheme of delay, Allied then filed its second notice of appeal and also filed extensive motions in the district court: (1) to withdraw its interlocutory appeal, (2) to amend the judgment, (3) in the alternative, to stay the judgment without bond pending appeal, (4) for an extension of time for transmission of the record on appeal, and (5) for transfer of the record to Cleveland. And, Allied also filed its third notice of appeal, to the Sixth Circuit Court of Appeals, docketed as Appeal No. 75-1510. The decision in that third appeal is the subject of this petition.

3. The district court found that Allied's claim that it could not arrange its catalog to distinguish between royalty bearing and non-royalty bearing products was unfounded. This is the term of the agreement which Allied now claims was not considered by the court.

4. Including Allied's letter to the court of December 9, 1974 in which Allied urged the court to decide the issues on the memoranda submitted, without oral hearing (A7n.2).

It was in reply to these motions that the district court observed (A. 29):

The court notes that the present motion could be construed as evidence of a tactic of delay and confusion. Such a tactic would border on bad faith by counsel. The court is heavily burdened with pressing judicial business, much of it involving civil rights litigation important to the public interest, and meaningless and dilatory pleading practices threaten to place an extra burden on the court that would seriously affect its ability to deal with meaningful matters. It is hoped that no such purpose motivates counsel in this case.

After this rebuke, Allied shifted its tactical game to the arena of the Sixth Circuit by filing in that court lengthy motions for (1) stay and supercedeas of injunction pending appeal, without further bond, or (2) alternatively, summary remand reversing or directing modification and reconsideration of final judgment. On June 23, 1975, the Sixth Circuit Court of Appeals denied these motions, whereupon Allied petitioned for reconsideration, which was also denied.

Ancillary to determining the amount of the bond on appeal, the district court had ordered Allied to state, under oath, the amount of money that would be due Aro under the settlement agreement. The sum, as sworn to by Allied, *did not exceed \$1,668.00* (A. 10).

After full briefing by both parties and oral argument, the Sixth Circuit Court of Appeals, affirmed-in-full the judgment of the district court (A. 1-A.11).

Following the decision of the Sixth Circuit Court of Appeals, Allied twice petitioned that court for stay of mandate. The last such petition was denied on June 29, 1976 by marginal endorsement. Allied also petitioned the court of appeals for rehearing, which was denied on May 7, 1976 (A. 14).

Finally, on August 4, 1976, Allied filed its Petition for Writ of Certiorari in this court.

REASONS WHY CERTIORARI MUST BE DENIED.

Allied calls for "clarification" of the law by this court in three areas. In each area the reasons advanced are specious. Allied has failed to show that any question is of the unusual public importance to warrant a request for review by this court.

A. Allied Made No Showing at All That Circuit Courts Are at Variance on Jurisdiction Question.

Allied admits, as it must, that a federal court has the inherent power to enforce a settlement agreement. Indeed the law is clear that this is the court's *duty*. Apparently Allied's contention is that the district court should not have taken jurisdiction of the settlement agreement because there is no diversity between the parties. Allied does not mention that the district court had jurisdiction over the patent infringement action, which was settled with the assistance of the court, by means of the agreement in question and which Allied attempted to repudiate.

Allied suggests a "need for guidelines . . . on the post-settlement inherent powers of federal trial courts—as to which the circuit courts are at variance; cf. *Kukla, Arvin, Kysor*, and the result in the case below." But, we find in the petition not even a hint as to what this "variance" might be. The fact is no variance exists. In the present case, federal question jurisdiction has always existed under Aro's original complaint (28 U. S. C. § 1338a). In *Kysor* and *Arvin* the original pleadings raised no federal question. *Kukla* supports the decisions below: a trial court can summarily enforce settlements.

United Mine Workers v. Gibbs, 383 U. S. 715 (1966) is not in point. That case involved pendant jurisdiction, not the inherent power of a court to enforce agreements terminating litigation.

To establish "guidelines" restricting a trial court's power to carry out the strong public policy favoring settlement of disputes is a perfect reason *not* to grant certiorari.

B. Judgment Does Not Prohibit Allied from Challenging the Patent and Is in No Way Contrary to *Lear*.

Allied states the "decision below would exclude Allied from an opportunity to continue its unending challenge to the Zwayer patent . . .". On the contrary, the trial court's judgment merely orders Allied to comply with the terms of the settlement agreement, executed after one and one half years of negotiations (A. 21). Allied's argument completely misconstrues the court's decision.

What Allied really wants is to use *Lear* as a pretext to avoid its contractual obligations. As the Sixth Circuit decision in this litigation so cogently puts it:

The mantle of *Lear* ill befits him who would use and reuse the courts as pawns in a private game of varying design. The "defender of the public interest" role is not available to him who would frustrate on whim the orderly conclusion of litigation (A. 9).

C. Allied Waived an Evidentiary Hearing.

Allied argues that "before muzzling any patent licensee to his license, a court should hold an evidentiary hearing to ascertain that the license and its provisions are lawful . . .".

As pointed by the appeals court, Allied waived a hearing:

In a letter to the district court, Allied's counsel stated a willingness to attend a hearing but stated, "*However*" (emphasis in letter), that Aro's "mere request" for an oral hearing on its motion was insufficient support for "departures from the long-standing practice in this district for submission of motions on memoranda only." (A. 7 n. 2.)

Further the court found the written settlement agreement to be clear and unambiguous and summary enforcement proper as a matter of law (A. 7).

As for the "muzzling", the judgment of the trial court does not enjoin Allied from bringing a suit on the validity of the patent. The dismissal was *without prejudice*. Allied of course does not *really* want to challenge the patent (which has only three years to run); it wants merely to cheat Aro out of royalties due under the settlement agreement.

Whether or not the agreement is valid is a new argument raised for the first time in this petition. It is too late. *Ernst & Ernst v. Hochfelder*, U. S., 96 S. Ct. 1375 (1976) and *Adickes v. S. H. Kress & Co.*, 398 U. S. 144, 90 S. Ct. 1958 (1970).

It is interesting to note that the provisions Allied now claims are unlawful were put into the contract at Allied's request after protracted negotiations.

D. Additional Reasons for Denying Petition.

It is perfectly clear that Allied has willfully studded the history of this litigation with virtually every conceivable technical and procedural delaying tactic that could possibly be utilized. The district court characterized Allied's actions in this case as "a tactic of delay and confusion" and that such "tactic would border on bad faith by counsel" (A. 29). And, the court of appeals, early in its decision, fully agreed with the district court's characterization of Allied's tactics (A. 3 n.1).

Allied has accepted all the benefits of the settlement agreement, including, *inter alia*, dismissal of the suit, release for past infringement of Allied, its suppliers and customers, and forgiveness of certain costs awarded against Allied by the District Court, without Allied's having performed its singular duty under the license (A. 7).

This court should not perpetuate such conduct.

Allied has now admitted, under oath, that, the maximum payments to Aro for the life of the agreement would be \$1,688.00 (A. 10). That admission was not made until well into the proceedings in the Sixth Circuit Court of Appeals, and only after Allied was ordered to divulge the information so that the district court could determine the amount of security to be posted on appeal.

The *de minimis* amount in controversy, together with Allied's exhaustive and expensive defense of this suit, dictates denial of the petition. There is no public interest involved. There is no need for clarification of the law. To grant certiorari in this case would serve only further to use the courts as "pawns" in Allied's "private game" (A. 9).

CONCLUSION.

For the foregoing reasons, it is submitted that Allied's petition for a writ of certiorari should be denied.

Respectfully submitted,

GEORGE B. NEWITT,
DANIEL M. RIESS,
ALLEGRETTI, NEWITT, WITCOFF &
MCANDREWS,
125 South Wacker Drive,
Chicago, Illinois 60606,
(312) 372-2160,
Attorneys for Respondent.